

COVID-19 workplace relations issues

SUMMARY

This advice addresses a number of workplace relations issues that have been commonly arising during the COVID-19 pandemic. Topics dealt with include the rights and entitlements of employers and employees in relation to:

- Self-isolation periods;
- Employees who become infected with COVID-19, including during a period of annual leave;
- Employees who provide care or support to members of their immediate family or household who become infected with COVID-19; and
- COVID-19 vaccinations.

What are the entitlements of an employee who is required to self-isolate because they are infected with COVID-19?

An employee who is infected with COVID-19 is required to self-isolate for a period (often 7 days, but the specific requirements in the relevant State or Territory need to be complied with).

During the self-isolation period, a full-time or part-time employee would be entitled to take any accrued personal/carer's leave, subject to the notice and evidence requirements in the *Fair Work Act 2009 (FW Act)*.

In addition, most awards contain an entitlement to up to two weeks of *unpaid* pandemic leave if an employee is required by government or medical authorities to self-isolate in response to the COVID-19 pandemic. During periods of such leave, employees are not entitled to be paid but the period counts as service for the accrual of entitlements under the award and the National Employment Standards. See [Employer Advice Nat 262/21](#).

If the employer allows the employee to work from home during the self-isolation period, the employee is of course entitled to be paid for the time worked.

Employees who are directed to isolate by a State or Territory public health order may be eligible for the [Pandemic Leave Disaster Payment](#) from the Federal Government. [State or Territory Pandemic Payments](#) may also be available.

What are the entitlements of an employee who is required to self-isolate because they are a close contact of a person infected with COVID-19?

An employee who is required to self-isolate for a period (e.g. 7 days) because they are a close contact of a person infected with COVID-19 is not entitled to take accrued personal/carer's leave unless they are providing care or support to a member of the employee's immediate family or household who is infected with COVID-19 or is otherwise ill or injured.

If the employer allows the employee to work from home during the self-isolation period, the employee is entitled to be paid for the time worked.

If the employee cannot work from home, they are not entitled to payment unless they use paid leave entitlements (e.g., paid annual leave or long service leave).

Most awards contain an entitlement to up to two weeks of *unpaid* pandemic leave if an employee is required by government or medical authorities to self-isolate in response to the COVID-19 pandemic. During periods of such leave, employees are not entitled to be paid but the period counts as service for the accrual of entitlements under the award and the National Employment Standards. See [Employer Advice Nat 262/21](#).

Employees who are directed to isolate by a State or Territory public health order may be eligible for the [Pandemic Leave Disaster Payment](#) from the Federal Government. [State or Territory Pandemic Payments](#) may also be available.

Employers should note that some States have introduced critical worker isolation exemptions for certain classes of workers who are close contacts of a confirmed case. The rules and conditions regarding critical worker isolation exemptions vary in each jurisdiction. Employers who need advice on this topic should contact Ai Group.

What are the entitlements of an employee who takes leave to provide care or support for a member of the employee's immediate family or household who is infected with COVID-19?

A full-time or part-time employee would be entitled to take any accrued personal/carer's leave to provide care or support to a member of the employee's immediate family or household who is infected with COVID-19, subject to the notice and evidence requirements in the FW Act.

In addition, an employee (including a casual) is entitled to take up to two days of *unpaid* carer's leave for each occasion that a member of the employee's immediate family or household is ill and requires care or support from the employee.

What are the entitlements of an employee who becomes infected with COVID-19, or who provides care and support to a member of the employee's immediate family or household who is infected with COVID-19, during a period of annual leave?

If a full-time or part-time employee becomes infected with COVID-19 during a period of annual leave, the employee is entitled to take any accrued personal/carer's leave for the time that the employee was unfit for work because of the infection and to have the annual leave re-credited for that time. (Refer to s.89(2) of the FW Act).

Similarly, if a full-time or part-time employee provides care or support to a member of the employee's immediate family or household who is infected with COVID-19, during a period of annual leave, the employee is entitled to take any accrued personal/carer's leave for the time that the employee provided care or support, and to have the annual leave re-credited for that time.

An employee wishing to access personal/carer's leave in these circumstances is required to comply with the same notice and evidence requirements in the FW Act as apply when taking personal/carer's leave at other times. That is, the employer can require the employee to provide evidence 'that would satisfy a reasonable person'.

If an employee is required by a public health order to be vaccinated in order to carry out work in a particular industry, occupation or area, does the employer need to pay the employee if the employee is not vaccinated?

If an employee is required by a public health order to be vaccinated in order to work in the relevant industry, occupation or area, and the employee is not vaccinated, the employee is not 'ready, willing and able' to work and hence is not generally entitled to be paid by the employer. In circumstances where an employee needs more time to arrange a vaccination, the employee may wish to take any accrued annual leave or long service leave.

There is no need for an employer to apply the stand down provisions in the FW Act in these circumstances. The employee is unable to attend work due to the Government's public health order.

Public health orders which require certain employees to be vaccinated include an exemption for employees who have a recognised medical contraindication supported by the required medical evidence as specified in the public health order.

Can an employer direct an employee to have a COVID-19 vaccination and what consultation needs to occur with employees before a direction is issued?

In circumstances where a relevant public health order is in place requiring an employee to be vaccinated, there is no need for the employer to issue a direction to the employee. A direction from the employer is unnecessary because the Government has already ordered the employee to be vaccinated through the public health order.

In circumstances where there is no relevant public health order in place, an employer can direct an employee to be vaccinated if such a direction is 'lawful and reasonable' in the circumstances.

In determining what is 'lawful and reasonable', the circumstances of both the employer and the employee need to be taken into account. Of course, if an employee has a genuine medical reason for not being vaccinated, backed up by the appropriate medical evidence, it would not be reasonable for an employer to direct the employee to be vaccinated.

On 3 December 2021, a Full Bench of the Fair Work Commission (**FWC**) handed down an important [decision](#) in the *CFMMEU v Mt Arthur* case. The case relates to a union challenge to a requirement by Mt Arthur Coal Pty Ltd (**Mt Arthur**) that its employees on the Mount Arthur coal mine site in NSW must be vaccinated against COVID-19 in order to enter the site. Mt Arthur is part of the BHP Group of companies. In the proceedings, the Commission considered in detail the meaning of 'lawful and reasonable' in respect of COVID-19 vaccination requirements. The Commission determined that Mt Arthur's site access requirement was not a 'reasonable' direction because the employer had not meaningfully consulted with its employees as required by Work Health and Safety (**WHS**) legislation, before issuing the direction. See [Employer Advice Nat 251/21](#) for details about the decision and for advice on appropriate consultation.

Following the decision, Mt Arthur immediately embarked upon another consultation process with its employees, overseen by the Commission, and then re-issued the direction in mid-December. On 17 December, the FWC issued a [Statement](#) setting out the consultation process that had occurred.

Can an employer decline to offer employment to a person who is not vaccinated or include a vaccination requirement in each new employee's contract of employment?

An employer who wishes to take either or both of these steps will need to be mindful of anti-discrimination laws. It is unlawful to directly or indirectly discriminate against a person on the basis of particular protected attributes.

One protected attribute that is potentially relevant to COVID-19 vaccinations is disability. If a person has a genuine medical reason for not being vaccinated, backed up by the appropriate medical evidence, it would be discriminatory in most circumstances not to employ the person on the basis of this disability.

Another protected attribute that may have relevance in a small number of circumstances is religion. If a person genuinely follows a particular religion and that religion prohibits vaccination by its followers, it may be discriminatory not to employ the person on the basis of their religion. However, it should be noted that none of the main religions oppose vaccinations.

There are various defences and exemptions contained in anti-discrimination legislation that may be relevant to an employer's decision to decline to offer employment to an unvaccinated person. Employers who need advice on this topic should contact Ai Group.

What can an employer do if an employee fails to comply with a public health order to be vaccinated?

If an employee is required by a public health order to be vaccinated in order to work in the relevant industry or occupation, and the employee is not vaccinated, as discussed above the employee is not 'ready, willing and able' to work and hence is not generally entitled to be paid unless the employee takes any accrued paid annual leave or long service leave.

An employer is not required to hold an employee's job open indefinitely if the employee is unable to fulfil the requirements of the job. However, if an employer is contemplating terminating the employment of an employee in these circumstances, the employer should contact Ai Group for advice before taking any action. Specific issues that should be considered by employers in such circumstances include:

- Would terminating the employee's employment be harsh, unjust or unreasonable? If so, such action could breach the unfair dismissal laws in the FW Act.
- Would termination of employment unlawfully discriminate against the employee on the basis of a protected attribute (e.g. a disability or their religion)? If so, terminating the employment could breach anti-discrimination laws or the general protections in the FW Act.

What can an employer do if an employee fails to comply with an employer direction to be vaccinated?

If the employer has issued a direction to an employee requiring the employee to have a COVID-19 vaccination and the direction is 'lawful and reasonable' (see above), the employer will be able to take disciplinary action if the employee fails to comply with the direction. However, if an employer is contemplating terminating the employment of an employee in these circumstances, the employer should contact Ai Group for advice before taking any action. Specific issues that should be considered include:

- Would terminating the employee's employment be harsh, unjust or unreasonable? If so, such action could breach the unfair dismissal laws in the FW Act.
- Would termination of employment unlawfully discriminate against the employee on the basis of a protected attribute (e.g. a disability or their religion)? If so, terminating the employment could breach anti-discrimination laws or the general protections in the FW Act.

Can an employer ask an employee for proof of vaccination status?

An employer can ask an employee for proof of their vaccination status if the collection of the information is reasonably necessary for business functions or activities.

An employer is only able to collect and store vaccination status information if an employee consents, except where a relevant exemption applies under the *Privacy Act 1988* (Cth). One exception is where the collection is required or authorised by law. Some public health orders which require that certain employees be vaccinated also require that employers collect vaccination status information from these employees.

If vaccination status information is going to be collected, the employer must advise each employee how this information will be handled at the time of asking for the employee's consent, including advising the employee of whether the employer intends to disclose the vaccination status information to any other

persons (e.g. to clients or customers). Reasonable steps need to be taken to keep the information secure and the information should only be accessible to a limited number of people who need to know the information.

The Office of the Australian Information Commissioner has issued [guidance](#) on various privacy issues relating to COVID-19 vaccinations.

Do you require further advice?

For further information or assistance, please contact Ai Group. Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy